

1985

Tree Products Company, an Oregon corporation v.
Amiron Development Company, a Utah
corporation, and Bales Construction Corporation,
a Utah corporation, Basin State Bank, et al. : Brief of
Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Dean H. Becker; Attorney for Plaintiff/Appellant.

Clark B. Allred; Gayle F. McKeachnie; Nielson and Senior; Attorneys for Defendant/Respondent.

Recommended Citation

Brief of Respondent, *Tree Products Company v. Amiron Development Company*, No. 198520660.00 (Utah Supreme Court, 1985).
https://digitalcommons.law.byu.edu/byu_sc1/547

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH SUPREME COURT
BRIEF

UTAH
DOCUMENT
K F U
45.9
.S9
DOCKET

1985-20660

IN THE SUPREME COURT OF THE STATE OF UTAH

TREE PRODUCTS COMPANY, an)
Oregon corporation,)

Plaintiff/Appellant,)

vs.)

Case No. 20660

AMIRON DEVELOPMENT COMPANY,)
a Utah Corporation, and BALES)
CONSTRUCTION CORPORATION, a)
Utah Corporation, BASIN)
STATE BANK, et al.,)

Defendant/Respondent.)

Category No. 13b

BRIEF OF RESPONDENT

Appeal from the Seventh Judicial District
Court of Uintah County,
The Honorable Richard C. Davidson, Judge.

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
363 East Main Street
Vernal, Utah 84078
Attorneys for Defendant/
Respondent, Basin State
Bank

DEAN H. BECKER
4000 West 4059 South
West Valley, Utah 84120
Attorney for Plaintiff/Appellant

FILED

MAR 17 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

TREE PRODUCTS COMPANY, an)	
Oregon corporation,)	
)	
Plaintiff/Appellant,)	
)	
vs.	)	Case No. 20660
)	
AMIRON DEVELOPMENT COMPANY,	)	Category No. 13b
a Utah Corporation, and BALES)	
CONSTRUCTION CORPORATION, a)	
Utah Corporation, BASIN)	
STATE BANK, et al.,)	
)	
Defendant/Respondent.)	

BRIEF OF RESPONDENT

Appeal from the Seventh Judicial District
Court of Uintah County,
The Honorable Richard C. Davidson, Judge.

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
363 East Main Street
Vernal, Utah 84078
Attorneys for Defendant/
Respondent, Basin State
Bank

DEAN H. BECKER
4000 West 4059 South
West Valley, Utah 84120
Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
STATUTE INVOLVED.....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENTS.....	7
ARGUMENTS.....	
I. PLAINTIFF'S CLAIM THAT BASIN STATE BANK IS LIABLE FOR NEGLIGENT MISREPRESENTATION WAS NOT RAISED BY PLAINTIFF UNTIL IT FILED ITS MOTION FOR SUMMARY JUDGMENT AND SINCE IT WAS NOT PROPERLY PLED, IT WAS NOT CONSIDERED BY THE TRIAL COURT.....	9
II. THE STATEMENTS MADE BY BASIN STATE BANK TO PLAINTIFF WERE TRUE. PLAINTIFF'S DAMAGES ARE THE RESULT OF PROBLEMS BETWEEN PLAINTIFF AND OTHERS THAT TRANSPIRED SOME FOUR MONTHS AFTER THE REPRESENTATIONS WERE MADE.....	14
III. IF THE PLAINTIFF HAD PLED A CLAIM OF NEGLIGENT MISREPRESENTATION OF CREDIT, THE SAME WOULD HAVE BEEN BARRED BY UTAH CODE ANN. §25-5-5.....	18
CONCLUSION.....	20
ADDENDUM	
1. Amended Complaint	
2. Ruling	
3. Summary Judgment	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Brock and Davis Company, Inc., vs. The Charleston National Bank, 443 F. Supp. 1175 (1977).....	19
Bundy vs. Century Equipment Company, 692 P.2d 754 (Utah 1984).....	9
Christensen vs. Commonwealth Land Title Insurance Company, 666 P.2d 302 (Utah 1983).....	14
Middlesex County National Bank vs. Redd Auto Sales, Inc., 147 N.E.2d 790 (Mass. 1958).....	18
Park City Utah Corp. vs. Ensign Company, 586 P.2d 446 (Utah 1978).....	9
Seneca Communications, Inc., vs. International Bank of California, 163 Cal. Rptr. 176, 103 Cal. App. 3rd 541 (1980).....	18
Teeling vs. The Indiana National Bank, 436 N.E.2d 855 (Ind. 1982).....	19
Williams vs. State Farm Insurance Company, 656 P.2d 966 (Utah 1982).....	10
<u>Other Authorities</u>	<u>Page</u>
Utah Code Ann. §25-5-5.....	1,7,18,20
Rule 8 U.R.C.P.....	1,7,9
Rule 9 U.R.C.P.....	1,7,9
Rule 41(a) U.R.C.P.....	12

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Basin State Bank submits the following as the issues to be reviewed by the Court:

1. Is a bank which accurately responds to an inquiry from a supplier regarding the status of a construction loan account, liable to the supplier when the borrower, several months later, returns the checks made to the supplier by the bank and directs the bank not to pay the supplier?

2. May the Plaintiff raise, for the first time on appeal, a claim of negligent misrepresentation when that claim was not pled as required by Rule 8 and Rule 9 of the Utah Rules of Civil Procedure and not decided by the trial court?

3. Is Plaintiff's claim of negligent misrepresentation regarding credit barred by the Statute of Frauds, Utah Code Ann. §25-5-5?

STATUTE INVOLVED

Utah Code Ann. §25-5-5

To charge a person upon a representation as to the credit of a third person, such representation, or some memorandum thereof, must be in writing subscribed by the party to be charged therewith.

STATEMENT OF THE CASE

Plaintiff, Tree Products Company, filed its Complaint seeking to foreclose its Mechanic's Lien on a condominium project. Named as Defendants were other mechanic lienholders, the lenders, the owner of the project and other

parties having an interest in the property. (R.1) The Court, on a Motion for Summary Judgment, ruled that the lender's Trust Deed had priority over the mechanic liens filed on the property. Plaintiff then filed its Amended Complaint listing several other causes of action against the lenders, the construction company and the owners of the project. (R. 178, Appendix No. 1) Shortly before the date set for trial of the case all issues between the parties were settled except for the Plaintiff's claim against Basin State Bank as set forth in the Eleventh Cause of Action of the Amended Complaint. The Eleventh Cause of Action alleges that Basin State Bank owed a duty to Plaintiff to properly supervise the loan, inspect the project and budget the disbursement of loan proceeds. The Plaintiff claimed Basin State Bank breached that duty. Those issues were submitted for decision to the Court, on Motions for Summary Judgment filed by both parties.

The Plaintiff did not contest the facts relied on by Basin State Bank in its Motion for Summary Judgment. (T.11-12 R. 834) Basin State Bank did not dispute most of the Plaintiff's facts. (T. 4-5)

The Court granted Basin State Bank's Motion for Summary Judgment and denied Plaintiff's Motion, holding that Basin State Bank did not owe a duty to Plaintiff to inspect and supervise the project and for disbursement of the loan

proceeds. That duty was owed to the lenders and the borrower. (Appendix Nos. 2 and 3 R. 922, 930) The Plaintiff, in its Motion for Summary Judgment raised for the first time a claim of negligent misrepresentation. The Court refused to rule on that issue when Basin State Bank objected that it had not been pled. (T. 3, 22) Plaintiff filed a Motion to Amend the Summary Judgment to include findings and a ruling on the claim of negligent misrepresentation which the Court denied. (R. 929 940) Plaintiff's appeal is based solely on its claim that Basin State Bank negligently misrepresented the credit worthiness of the developer when the bank stated that there was money in the loan sufficient to cover the materials to be supplied by Plaintiff. That claim was not property pled before the trial court and so it did not rule on it.

In the fall of 1981 Amiron Development Corporation (Amiron) obtained funding from Defendants, First Federal Savings and Loan Association of Grand Rapids, Minnesota, First Federal Savings and Loan Association of Brainerd, Minnesota, First Federal Savings and Loan Association of Cincinnati, Ohio, and Oskaloosa Home Loan and Savings Association (hereinafter Lenders) for a condominium project in Vernal, Utah. The Lenders agreed to provide \$2,300,000.00 for the construction of the project. The Lenders and Amiron later reduced the loan to \$2,250,000.00.

(R. 774)

The Lenders did not have an office in the State of Utah. To service the loan they contracted with Basin State Bank. The parties signed a Loan Servicing Agreement on October 9, 1981. (R.778).

Basin State Bank then signed a Construction Agreement with Amiron dated October 13, 1981. (R.785) Amiron hired, as its general contractor, Bales Construction Company (Bales). Bales was responsible for constructing the project and for hiring its own sub-contractors and suppliers. (R. 814)

As the project proceeded Amiron submitted monthly draw requests to Basin State Bank. The draw requests listed the subcontractor or supplier and the amount to be paid. Freestone Construction would then visit the project site, on behalf of Basin State Bank, to determine if the supplies listed on the draw request had been delivered. (R. 774) If the supplies were there Basin State Bank would obtain the money from the Lenders, prepare checks to the various suppliers and deliver those checks to Amiron. Amiron and Bales would disburse the checks. (R. 774) Basin State Bank would then report to the Lenders setting forth the amount that had been disbursed and the amount remaining in the construction loan. (R. 774)

In the spring of 1982, Bales entered into a contract

with Plaintiff to provide redwood siding. Plaintiff's first delivery was on May 24, 1982, and the last delivery was on June 25, 1982. (R.254) Plaintiff claims that on May 14, 1982, one of its agents contacted, by telephone, Bruce Watkins, an officer of Basin State Bank, regarding the project. Plaintiff alleges that Mr. Watkins told Plaintiff that the project was fully funded by the Lenders in the amount of \$2,300,000.00, and that when Plaintiff's invoices were submitted as provided by the draw procedure they would be paid. (R. 885)

The draw sheets for June, July and August included invoices for the Plaintiff. (R. 791-804) Basin State Bank prepared checks payable to the order of Plaintiff to pay those invoices. (R. 805-811) On June 28, 1982, nine checks were prepared in a combined amount of \$33,304.06. On July 30 four checks were prepared in a combined amount of \$17,264.56. On August 4 one check was prepared in the amount of \$11,029.78. The checks were delivered to Amiron for delivery to Plaintiff.

Amiron and Plaintiff got into a dispute about the amount owed to Plaintiff. In late August, 1982, Amiron returned to Basin State Bank the checks made payable to Plaintiff. Amiron instructed Basin State Bank to return the funds to the project construction account. (R. 776, 805-811)

On September 2, 1982, the contractor's draw request for

August was submitted to Basin State Bank. Basin State Bank's calculations showed that once that draw request was paid that approximately \$50,000.00 would be left in the construction account. The bank gave notice of that to Amiron and the Lenders. (R. 880) Amiron and the Lenders determined that \$50,000.00 would not be sufficient to complete the project. Basin State Bank was instructed to disburse the remaining proceeds to suppliers as directed by Amiron. Plaintiff was not one of the parties paid. Amiron and the Lenders failed to come to any agreement regarding the loaning of additional funds. The Lenders then directed Basin State Bank to foreclose the Trust Deed.

SUMMARY OF ARGUMENTS

1. Rule 8 and Rule 9 of the Utah Rules of Civil Procedure require that negligent misrepresentation be pled with particularity. Plaintiff did not plead it at all and for the first time raised the claim in its Motion for Summary Judgment. The trial court did not rule on the claim but based its ruling on the issues pled. The Court correctly refused to amend its ruling to include a ruling on the issue of negligent misrepresentation since it was not pled. The Plaintiff has not challenged the decision of the Court on the issues decided by the Court, but has based its appeal solely on negligent misrepresentation which was not properly raised at the trial court nor decided by it.

2. The information given to Plaintiff by Basin State Bank which Plaintiff claims constitutes negligent misrepresentation were the true facts. Plaintiff's loss was caused by its refusal to accept payment when tendered and the subsequent return by the borrower, of the checks prepared to pay Plaintiff, with instructions to void the checks and to use the funds to pay future draws.

3. Utah Code Ann. §25-5-5 bars a claim of misrepresentation unless the representation is in writing and subscribed to by the party sought to be bound. The Plaintiff is relying on alleged information received in two telephone calls. The alleged representation is not in

writing and is not subscribed to by Basin State Bank and therefore the claim is barred.

ARGUMENT

POINT I

PLAINTIFF'S CLAIM THAT BASIN STATE BANK IS LIABLE FOR NEGLIGENT MISREPRESENTATION WAS NOT RAISED BY PLAINTIFF UNTIL IT FILED ITS MOTION FOR SUMMARY JUDGMENT AND SINCE IT WAS NOT PROPERLY PLED IT WAS NOT CONSIDERED BY THE TRIAL COURT.

The sole issue raised by the Plaintiff, in its Appeal, is that Basin State Bank should be liable for alleged negligent misrepresentations regarding credit. That issue was not raised in Plaintiff's pleadings, and therefor the trial court refused to consider that issue.

It is the general rule in this jurisdiction that a party cannot raise an issue on appeal which has not been properly pled and raised before the trial court. Park City Utah Corp. vs. Ensign Company, 586 P.2d 446 (Utah 1978), Bundy vs. Century Equipment Company, 692 P.2d 754 (Utah 1984) Rule 8(a) of the Utah Rules of Civil Procedure requires that the pleadings set forth; "(A) short and plain statement of the claim showing that the pleader is entitled to relief...."

Rule 8(c) coupled with Rule 9(b) of the Utah Rules of Civil Procedure require that in cases involving allegations of fraud that the circumstances constituting the fraud must be stated with particularity. The requirements of Rule 9(b) have not been limited to common law fraud, but have been expanded to all circumstances where the pleader alleges

misrepresentations, omissions, or other deceptions covered by the term fraud in its broadest dimension. Williams vs. State Farm Insurance Company, 656 P.2d 966 (Utah 1982)

Plaintiff's original Complaint set forth four causes of action. They were lien foreclosure, breach of contract, failure to comply with a bonding statute and quantum meruit. (R.1) The trial court entered its Partial Summary Judgment denying Plaintiff's claim based on lien foreclosure. Plaintiff then filed its Amended Complaint adding seven more causes of action. (R.178, Appendix 1) The new sixth cause of action alleged fraud, claiming that Ken Nordley, an employee of the Lenders, had represented that additional financing would be provided to Amiron to complete the project, that said representation was false and that Plaintiff had relied on that representation to its detriment. The Amended Complaint did not contain a claim against Basin State Bank for negligent misrepresentation regarding credit.

On August 7, 1984, Plaintiff moved to again amend its Complaint. The Court allowed Plaintiff to amend its Complaint to the extent of raising a Promissory Estoppel claim. (R.741) The Motion did not request and the Court did not allow the filing of a claim based on negligent misrepresentation regarding credit. The case was then scheduled for trial beginning November 29, 1984. The

Lenders, the Plaintiff and the other lienholders, entered into negotiations and just prior to the time set for trial reached a settlement. Basin State Bank was not a party to those settlement negotiations.

On November 29, 1984, the date scheduled for trial, the attorney for Plaintiff and the attorney for Basin State Bank met with the Court at an informal conference to explain to the Court the status of the case. The Court was informed that all issues had been resolved except for the claims alleged against Basin State Bank by Plaintiff in the eleventh cause of action of the Amended Complaint. The attorneys represented to the Court that rather than proceeding forward with trial it was felt that the issues set forth in the eleventh cause of action could be handled on Motions for Summary Judgment. Plaintiff at that time indicated to the Court that it wanted to include a claim of negligent misrepresentation. Basin State Bank objected to the adding of any claim. No further action was taken by Plaintiff to make that amendment.

Both parties filed their Motions for Summary Judgment. Plaintiff included in its Motion for Summary Judgment a claim based on negligent misrepresentation of credit. Oral argument on the Motions was held on December 11, 1984. At that hearing Basin State Bank objected to including the issue of negligent misrepresentation as the same had not

been appropriately raised in the pleadings. (T.3, 22) Plaintiff made no effort to amend its pleadings to raise that issue.

The trial court in granting Basin State Bank's Motion for Summary Judgment ruled only on the issues set forth in the eleventh cause of action. The Court did not consider the issue of negligent misrepresentation to be before the court and refused to rule on that issue. Plaintiff then filed its Objection to and Motion to Amend the Summary Judgment asking the Court to include a ruling on the claim of negligent misrepresentation. The Court denied that Motion. (R. 929, 940)

The Defendant, Lenders, the Plaintiff and the other mechanic lienholders, as evidence of their settlement prepared and submitted to the Court a document entitled Stipulation, Motion and Order of Dismissal. (R.899) That document indicates that Plaintiff reserved the right to pursue a claim based on negligent misrepresentations of credit. Basin State Bank was not a party to that document, did not receive a copy of it and therefore should not be bound by the terms of that document. Rule 41(a) of the Utah Rules of Civil Procedure requires that a party, to be bound by a Motion and Order of Dismissal, must sign the Stipulation.

Plaintiff had ample opportunity to raise its claim of

negligent misrepresentation regarding credit. Plaintiff, however, did not raise that claim until it had settled all its claims except the claims against Basin State Bank set forth in its eleventh cause of action. Plaintiff then, in its Motion for Summary Judgment, argued the issue but took no action to amend its pleadings to raise the issue. Negligent misrepresentation is a claim arising out of fraud and must be pled with particularity. The trial court refused to consider the issue since it had not been properly pled. An issue which has not been properly pled and considered by the trial court is not an appropriate issue for appeal. Since it is the only issue on appeal the appeal should be denied and the ruling of the lower court affirmed.

POINT II

THE STATEMENTS MADE BY BASIN STATE BANK TO PLAINTIFF WERE TRUE. PLAINTIFF'S DAMAGES ARE THE RESULT OF PROBLEMS BETWEEN PLAINTIFF AND OTHERS THAT TRANSPIRED SOME FOUR MONTHS AFTER THE REPRESENTATIONS WERE MADE.

A critical element of any claim based on fraud, including negligent misrepresentation, is that there must have been a statement, of presently existing fact, which statement was false. Christensen vs. Commonwealth Land Title Insurance Company, 666 P.2d 302 (Utah 1983) The statements made by Basin State Bank were true. Basin State Bank prepared and delivered checks to Plaintiff for payment. Plaintiff's dispute with Bales and Amiron over the amount to be paid and Amiron's subsequent direction that the proceeds be disbursed to other parties was the cause of Plaintiff's loss.

Plaintiff's claim of negligent misrepresentation is based on two conversations which occurred May 14, 1982 and July 22, 1982. In the spring of 1982 Bales contacted Plaintiff and requested that Plaintiff provide siding for the condominium project. Donald Fraser, an employee of Plaintiff, claims that on May 14, 1982, he contacted Bruce Watkins at Basin State Bank. Mr. Fraser claims that Mr. Watkins told him that the project was fully funded in the amount of \$2,300,000.00 by five federal savings and loans, that once Plaintiff invoices were approved by Bales and

forwarded to Basin State Bank those invoices would be paid and that Bales credit was good for shipment of goods up to \$70,000.00. (R.886 Paragraph 9)

On May 14, 1982, there was a construction loan in the amount of \$2,300,000.00 for the construction of the condominium project. That construction loan was financed by five federal savings and loans, with Basin State Bank acting as servicing agent. Invoices, by materialmen on the project, were submitted to Bales which then submitted those invoices to Basin State Bank on draw sheets. When Basin State Bank determined that the materials had in fact been provided, checks were issued to Bales for delivery to the materialmen. All the statements made by Basin State Bank on May 14, 1982, were true.

Plaintiff made its first delivery of redwood siding on May 24, 1982 and the last delivery on June 25, 1982. (R.254) Invoices for those materials were delivered to Bales. Bales incorporated those invoices on draw sheets to Basin State Bank. Basin State Bank prepared checks made payable to Plaintiff and delivered the same to Bales. Bales apparently did not deliver the checks to Plaintiff because of concerns about whether Plaintiff had paid its supplies for the siding. A telephone conversation was held on July 21, 1982, between Amiron, Bales and Plaintiff. An agreement was reached that when Plaintiff furnished documentation showing

that the siding was fully paid for the checks would be released by Bales.

On July 22, 1982, Joseph Zabaldo called Dan Turner at Basin State Bank. Mr. Zabaldo claims that Dan Turner told him that the project was fully funded and that Plaintiff's invoices would be paid. Those statements were true and in fact checks had already been issued by Basin State Bank to pay Plaintiff's invoices.

On July 28, 1982, Plaintiff and Bales disagreed on the price for the siding. Amiron, in August, returned the checks to Basin State Bank, and directed that Basin State Bank cancel the checks and use the funds for future draws.

The August, 1982, draw was received on September 2, 1982. Payment of that draw left approximately \$50,000.00 remaining in the construction loan. That information was provided to Amiron and the Lenders. Amiron reported that \$50,000.00 would not be sufficient to complete the project. Amiron and the Lenders entered into discussions regarding providing more money for the project. Amiron and the Lenders were unable to reach an agreement and the remaining \$50,000.00 was ordered disbursed to certain materialmen and construction ceased.

The information provided in the telephone conversations of May 14, 1982, and July 22, 1982, was true. The project was fully funded by a construction loan of \$2,300,000.00.

In late summer of 1982 that loan was reduced to \$2,250,000.00 by agreement of the Lenders and Amiron when they cut back the scope of the project. Plaintiff's invoices were paid by Basin State Bank. Plaintiff's loss was caused, not by the statements of Basin State Bank, but by its disputes with Bales and Amiron and Amiron's subsequent voiding of the checks delivered for payment of Plaintiff's invoices.

POINT III

IF THE PLAINTIFF HAD PLED A CLAIM OF NEGLIGENT MISREPRESENTATION OF CREDIT, THE SAME WOULD HAVE BEEN BARRED BY UTAH CODE ANN. §25-5-5.

Utah Code Ann. §25-5-5 provides:

"To charge a person upon a representation as to the credit of a third person, such representation, or some memorandum thereof, must be in writing subscribed by the party to be charged therewith."

The two telephone conversations relied on by Plaintiff to support its claim of negligent misrepresentation regarding credit are barred by the terms of that statute. Middlesex County National Bank vs. Redd Auto Sales, Inc., 147 N.E.2d 790 (Mass. 1958), Seneca Communications, Inc. vs. International Bank of California, 163 Cal. Rptr. 176, 103 Cal. App. 3rd 541 (1980)

The Plaintiff did not raise, in its pleadings, a claim of negligent misrepresentation. Therefore, Basin State Bank did not raise the affirmative defense of the statute of frauds. One has no obligation to raise an affirmative defense until the other party raises, in its pleadings, the claim to which the affirmative defense applies. The instant Plaintiff indicated in an informal conference with the Court and then in its Motion for Summary Judgment that it intended to raise a claim of negligent misrepresentation regarding credit, Basin State Bank objected and indicated that if the Court were to allow the amendment of Plaintiff's pleadings to raise that issue that the Basin State Bank would amend

its Answer to raise the defense of the statute of frauds. Since the Court never allowed the Plaintiff to amend its pleadings the statute of frauds was not pled as a defense.

Even if the Plaintiff would have been allowed to amend its pleadings to allege negligent misrepresentation, such a claim is barred by the statute of frauds. Courts in the United States which have discussed similar statutes have held that it does apply to negligent misrepresentation. A few states have created an exception when there existed a fiduciary duty between the bank and the party receiving the representation or when the bank received a direct benefit as a result of the representation. Teeling vs. The Indiana National Bank, 436 NE.2d 855 (Ind. 1982), Brock and Davis Company, Inc., vs. The Charleston National Bank, 443 F. Supp. 1175 (1977) Those facts do not exist here. There is no fiduciary relationship between Basin State Bank and Plaintiff. Basin State Bank did not receive any benefit as a result of the two telephone conversations. The only benefit Basin State Bank received was a servicing fee from the Lenders which fee was unrelated to the two telephone conversations claimed to have been relied on by Plaintiff. A remote benefit such as the servicing fee does not come within the exception. Brock and Davis Company, Inc., vs. The Charleston National Bank, supra.

CONCLUSION

The claim raised by the Plaintiff was never pled at the trial court and therefore was not considered nor ruled on by the trial court. The statements made by Basin State Bank to Plaintiff were true and do not constitute misrepresentation of any kind. The claim therefore, cannot be raised on appeal. The claim is also barred by Utah Code Ann., §25-5-5.

Respectfully submitted this 14 day of March, 1986.

NIELSEN & SENIOR
Attorneys for Respondent

By: Clark B. Allred
Clark B. Allred

By: Gayle F. McKeachnie
Gayle F. McKeachnie

ADDENDUM

FILED
DISTRICT COURT
UINTAH COUNTY UTAH

JUN 13 1983

DOROTHY LUCK CLERK

BY L. J. [Signature] DEPUTY

PARK AND ROBINSON

ATTORNEYS AT LAW

80 NORTH 100 EAST

P. O. BOX 1266

PROVO, UTAH 84601

Telephone (801) 375-1920

David L. Glazier and

Mark F. Robinson

Attorneys for Plaintiff

IN THE SEVENTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

TREE PRODUCTS COMPANY, an
Oregon corporation,

Plaintiff,

AMENDED COMPLAINT

vs.

Civil No. 11-1)

AMIRON DEVELOPMENT COMPANY, a
Utah corporation, and BALES
CONSTRUCTION CORPORATION, a
Utah corporation, KIETH L.
SQUIRE, CAROLE S. SQUIRE, aka
CAROL S. SQUIRE, BASIN STATE
BANK, FIRST FEDERAL SAVINGS &
LOAN ASSOCIATION OF GRAND RAPIDS,
MINNESOTA, FIRST FEDERAL SAVINGS &
LOAN ASSOCIATION OF BRAINERD,
MINNESOTA, FIRST FEDERAL SAVINGS &
LOAN ASSOCIATION OF CINCINNATI, OHIO,
OSKALOOSA HOME LOAN & SAVINGS ASSOCIATION
(of Oskaloosa, Iowa), TOWN & COUNTRY
TITLE, INC., LAD SHAKE, KOLOB LUMBER CO.,
INC., an Oregon corporation, dba REDWOOD
EMPIRE LUMBER, LTD., JAMES H. HARVEY,
dba RUSHMORE INTERMOUNTAIN ENTER-
PRISES, MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY, UTAH DEPARTMENT OF
TRANSPORTATION, DENNIS MOTT, dba ASPEN
BROOK REALTY, ALL WEATHER INSULATION,
INC., HERBERT BALES, dba BALES CONSTRUC-
TION, DAVID LEE MILLER, DRY WALL SUPPLY,
INC., JOEL DIETRICH, BATLEY PLUMBING
AND HEATING, INC., DOUGLAS B. MANGRUM,
dba DOUG MANGRUM ROOFING, GENERAL

ELECTRIC COMPANY, BRENT JOHN HAMBLIN,
JONES PAINT AND GLASS, JAY GORDON
DRY WALL, LEE ANDERSON, dba FASHION-
WISE KITCHENS, CAVALIER ENTERPRISES,
INC., LINDA PEASE and LEANNA
THUREHORST, dba L & L CLEANING,
TASCO ELECTRIC, INC., HERBERT BALES,
KEVIN BALES, KIM BALES, THOMAS MOLEN,
MIKE RASMUSSEN, ASSOCIATED TITLE
COMPANY OF CENTRAL UTAH, a Utah corpora-
tion, and JOHN DOES I through XX,

Defendants.

COMES NOW the plaintiff, by and through its attorneys
David L. Glazier and Mark F. Robinson for PARK & ROBINSON and
complains against the defendants and each of them as follows:

GENERAL ALLEGATIONS

1. At all times material herein, plaintiff Tree Products
Company was and is an Oregon corporation, qualified to do
business in the State of Utah and properly licensed to furnish
the contracting materials set forth herein.

2. All of the real property which is being foreclosed on
herein, and to which all of the materials supplied by plaintiff
were delivered, for purposes of this lawsuit, is described as
Ashley Park Condominiums, Phases 1 and 2, Vernal, Uintah County,
Utah, and more particularly described as follows:

PARCEL NO. 1:

Commencing at a point located North 2° 04'
52" West along the Quarter section line
1,432.45 feet and West 32.82 feet from the
center of Section 14, Township 4 South,
Range 21 East, Salt Lake Base and Meridian;
thence South 88° 39' 56" West 19.07 feet;
thence along the arc of a 324.00 foot
radius curve 164.92' chord bears South 74°
05' 02" West 163.14 feet; thence South 59°
30' 08" West 255.48 feet; thence along the
arc of a 255.00 foot radius curve 129.07
feet chord bears South 74° 00' 08" West
127.69 feet; thence South 88° 30' 08" West

44.66 feet; thence South 01° 29' 52" East
100.97 feet; thence North 57° 57' 36" West
19.84 feet; thence South 87° 01' 27" West
146.12 feet; thence North 01° 16' 19" West
62.52 feet; thence North 24° 56' 49" East
48.94 feet; thence along the arc of a
120.00 foot radius curve chord bears North
47° 35' 44" West 72.00 feet; thence North
30° 08' 17" West 268.63 feet; thence along
the arc of a 20.00 foot radius curve 18.37
feet chord bears North 56° 27' 26" West
17.73 feet; thence North 00° 50' 26" West
127.70 feet; thence North 89° 09' 34" East
903.77 feet; thence South 01° 20' 04" East
229.35 feet to the point of beginning.
Area 7.352 acres.

PARCEL NO. 2:

Commencing at a point located North 02° 04' 52" West along the Quarter section line 1123.05 feet and West 767.63 feet from the center of Section 14, Township 4 South, Range 21 East, Salt Lake Base and Meridian; thence as follows: South 87° 01' 27" West 135.56 feet; thence North 85° 53' 22" West 96.00 feet; thence North 70° 44' 11" West 102.04 feet; thence South 86° 44' 13" West 238.34 feet; thence North 01° 27' 23" West 499.69 feet; thence North 89° 09' 34" East 392.71 feet; thence South 00° 50' 26" East 127.70 feet; thence along the arc of a curve 18.37 feet chord bears South 56° 27' 26" East 17.73 feet; thence South 30° 08' 17" East 268.63 feet; thence along the arc of a curve 73.13 feet chord bears South 47° 35' 44" East 72.00 feet; thence South 24° 56' 49" West 48.94 feet; thence South 01° 16' 19" East 62.52 feet to the point beginning.
Area 5.575 acres.

3. The defendants Amiron Development Company, herein "Amiron", and Bales Construction Corporation, herein "Bales" or "Bales Construction", are corporations licensed to do business in the State of Utah.

4. The defendant Amiron is the owner of the real property described above, herein the "subject property."

5. The defendant Bales Construction was the contractor in charge of the construction of the buildings on the subject property.

6. The defendant Kieth L. Squire, Carole S. Squire, aka Carol S. Squire, are the sellers under a Uniform Real Estate Contract recorded October 20, 1981, as Entry No. 186253 in Book 290, Page 740, of the official records of the Uintah County Recorder's Office, wherein they sold the subject property to the defendant Amiron. The defendants Squires are also beneficiaries under a Trust Deed in the amount of \$167,200.00, dated July 28, 1981, recorded October 27, 1981, as Entry No. 186385 in Book 291, Page 89, of the official records of the Uintah County Recorder's Office. The Squires have also executed a Subordination Agreement recorded October 27, 1981, as Entry No. 186386 in Book 291, Page 92, of the official records of the Uintah County Recorder's Office, subordinating their interest under the above described trust deed to the interest of Basin State Bank under the Deed of Trust next described below.

7. The defendant Basin State Bank is a trustee and beneficiary under a Deed of Trust executed by Amiron in the amount of \$2,300,000.00, dated October 19, 1981, and recorded that same date as Entry No. 186206 in Book 290, Page 651, and re-recorded October 23, 1981, as Entry No. 186360 in Book 291, Page 34 of the official records of the Uintah County Recorder's Office. The defendant Basin State Bank is also a trustee and beneficiary under a Deed of Trust dated July 28, 1981, executed by Amiron in the amount of \$48,000.00, and recorded September 4, 1981, as Entry No. 185283 in Book 288, Page 705, of the official records of the Uintah County Recorder's Office.

8. The beneficial interest of the defendant Basin State Bank in and to the trust deed first described in the above paragraph, in the amount of \$2,300,000.00, was assigned to the defendant First Federal Savings & Loan Association of Grand Rapids, Minnesota--32.6%, First Federal Savings & Loan Association

of Brainerd, Minnesota--23.91%, First Federal Savings & Loan Association of Cincinnati, Ohio--21.74%, and Oskaloosa Home Loan & Savings Association, Oskaloosa, Iowa--21.74%, by an assignment dated October 19, 1981, and recorded that same date as Entry No. 186207 in Book 290, Page 655, and re-recorded October 23, 1981, as Entry No. 186359 in Book 291, Page 33 of the official records of the Uintah County Recorder's Office.

9. The defendant Town & Country Title, Inc., is a trustee under that trust deed described in paragraph 6 above, executed by the defendant Amiron, and naming as beneficiaries, the defendants Kieth L. Squire and Carole S. Squire, dated July 28, 1981, and recorded October 27, 1981, as Entry No. 186385.

10. The defendant Lad Shake has filed a notice of lien dated July 1, 1982, against the defendant Amiron in the amount of \$5,508.08, recorded July 1, 1982, as Entry No. 193227-1 in Book 308, Page 121, of the official records of the Uintah County Recorder's Office.

11. The defendant Kolob Lumber Co., Inc., an Oregon corporation, dba Redwood Empire Lumber, Ltd., filed a notice of lien dated August 20, 1982, against the defendant Amiron in the amount of \$55,126.28, plus interest, recorded August 23, 1982, as Entry No. 194566 in Book 312, Page 265 of the official records of the Uintah County Recorder's Office.

12. The defendant James H. Harvey, dba Rushmore Intermountain Enterprises, filed a notice of lien dated September 10, 1982, against the defendants Amiron, Bales Construction, and Aspen Brook Realty in the amount of \$19,527.00, recorded September 10, 1982, as Entry No. 195093, in Book 313, Page 753 of the official records of the Uintah County Recorder's Office.

13. The defendant Mountain States Telephone and Telegraph Company is the owner of a right-of-way easement created by an instrument recorded April 26, 1982, as Entry No. 191122 in Book 303, Page 158 of the official records of the Uintah County Recorder's Office.

14. The defendant Utah Department of Transportation executed an agreement for change of access openings, with the defendant Amiron, recorded July 1, 1982, as Entry No. 193213 in Book 308, Page 90, of the official records of the Uintah County Recorder's Office.

15. The defendant Dennis Mott, dba Aspen Brook Realty, is the plaintiff in Civil Action No. 11,529, filed June 25, 1982, against the defendant Amiron, with respect to the subject property, seeking damages in the amount of \$687,738.00.

16. The defendant All Weather Insulation, Inc., is the plaintiff in a Civil Action, No. 11,625, filed August 19, 1982, against the following defendants: Herbert Bales, dba Bales Construction, David Lee Miller, Dry Wall Supply, Inc., Joel Dietrich, Batley Plumbing and Heating, Inc., Douglas B. Mangrum, dba Doug Mangrum Roofing, General Electric Company, Brent John Hamblin, Jones Paint and Glass, Jay Gordon Dry Wall, Lee Anderson, dba Fashionwise Kitchens, Cavalier Enterprises, Inc., Linda Pease and Leanna Thurehorst, dba L & L Cleaning, Tasco Electric, Inc., Jim Harvey, dba Rushmore Enterprises, Basin State Bank, Oskaloosa Home Loan and Savings Association, First Federal Savings & Loan Association and Amiron.

FIRST CAUSE OF ACTION

Lien Foreclosure

17. Plaintiff incorporates herein the allegations contained in Paragraphs 2 through 16 above.

18. Between the approximate dates of May 24, 1982, and June 25, 1982, plaintiff supplied lumber materials to the defendant Bales Construction for the defendant Amiron at the subject property, pursuant to an Acknowledgement of Order between the plaintiff and the defendant Bales Construction, a copy of which is on file with the Court as Exhibit "A" and incorporated herein by this reference.

19. The defendant Bales Construction agreed pursuant to said Acknowledgement of Order to pay the plaintiff for said lumber materials \$785.00 per 1000 board feet.

20. The reasonable value of the lumber materials delivered by plaintiff to the subject property was \$66,405.37. Plaintiff has not been paid for said lumber materials, leaving a principal balance of \$66,405.37 remaining owed to plaintiff by defendants, against which there are no offsets or credits, and secured by the lien described below.

21. Within the time prescribed by law, the plaintiff recorded a notice of lien, pursuant to Section 38-1-1, et seq., Utah Code Annotated, which notice was recorded on August 27, 1982, as Entry No. 194704, in Book 312, on Page 685, in the official records of the Uintah County Recorder, a copy of which is on file with the Court as Exhibit "B" and incorporated herein by this reference.

22. For purposes of this lien foreclosure action, the defendants presently owe the plaintiff the total of \$66,405.37 plus interest thereon accrued through August 23, 1982, in the amount of \$1,579.68, and thereafter at the rate of 18% per annum, pursuant to the terms of plaintiff's invoices, which were mailed to Bales Construction at the time of each shipment and which are on file with the Court as Exhibits C-1 through C-14 and incorporated herein by this reference. There are no offsets or credits against said sums.

23. Plaintiff has and claims a lien on and against the interests of the defendants and their assigns as to the subject property together with all improvements and fixtures situated thereon pursuant to Section 38-1-1, et. seq., U.C.A., for the reasonable value of the materials furnished, together with costs, interest and reasonable attorney's fees.

24. All of the defendants named in this action claim some interest in and to the subject property or some portion thereof. The right, title, claim, lien and interest of all the defendants, and each of them, and all persons claiming under them, in and to the subject property are subject to, junior and subordinate and inferior to the lien and claim of the plaintiff. Plaintiff's

lien is superior and prior both in time and in right to the rights, titles, claims and interests of all of the defendants named herein, and each of them, and all persons claiming under them, in and to the subject property.

25. The plaintiff is entitled to have its lien foreclosed and to have the subject property sold to satisfy the debt owed the plaintiff, its costs and attorney's fees in this action.

SECOND CAUSE OF ACTION

Breach of Contract

26. Plaintiff realleges the allegations of paragraphs 1 through 25 above.

27. Defendant Bales Construction is indebted to plaintiff in the amount of \$66,405.37, plus interest accrued thereon through August 23, 1982, in the amount of \$1,579.68 and thereafter at the rate of 18% per annum, for lumber materials supplied at the request of the defendant Bales Construction pursuant to their agreement.

28. The defendant Bales Construction agreed, pursuant to: (a) telephone conversations with Joel T. Zabaldo, of the plaintiff Tree Products Company, and (b) an Acknowledgement of Order mailed from the plaintiff to the defendant Bales Construction, a copy of which is on file with the Court as Exhibit "A", and (c) plaintiff's invoices which were mailed to Bales Construction at the time of each shipment and which are on file with the Court as Exhibits C-1 through C-14, to pay the cost of said lumber materials, plus interest at the rate of 18% per annum until paid.

29. Despite repeated demands by the plaintiff, the defendant has failed to make payment for the lumber materials supplied pursuant to the terms of their agreement.

30. As a result of the foregoing, the plaintiff has been damaged and the defendant Bales Construction is liable to the plaintiff in the sum of \$66,405.37, with interest in the amount

of \$1,579.68 through August 23, 1982, and thereafter at the rate of 18% per annum until paid, for the defendant's failure to perform pursuant to the terms of the agreement.

THIRD CAUSE OF ACTION

Bonding Statute

31. Plaintiff realleges the allegations of paragraphs 1 through 30 above.

32. Plaintiff within one year from the date of the commencement of this action furnished lumber materials incorporated into and connected with the building structures and improvements located upon the subject property, which is owned by defendant Amiron.

33. The furnishing of materials in accordance with and pursuant to the agreement entered into between plaintiff and defendant Bales Construction was in an aggregate amount in excess of \$2,000.00

34. Defendant Amiron failed to furnish or require a bond as required by Utah Code Annotated, Section 14-2-1.

35. The defendants Basin State Bank, First Federal Savings & Loan Association of Grand Rapids, Minnesota, First Federal Savings & Loan Association of Brainerd, Minnesota, First Federal Savings & Loan Association of Cincinnati, Ohio, and Oskaloosa Home Loan & Savings Association are owners of a beneficial interest in the land which is the subject matter of this law suit inasmuch as they are beneficiaries under a Trust Deed on the subject property.

36. The defendants mentioned in paragraph 35 failed to furnish or require a bond as required by Utah Code Annotated, Section 14-2-1.

37. The reasonable value of the materials furnished and delivered by the plaintiff and incorporated into the subject property is \$66,405.37 of which none has been paid, leaving a balance due and owing of \$66,405.37, against which there are no offsets or credits.

38. As a result of the foregoing, the plaintiff has been damaged and the defendants mentioned in paragraphs 34 and 35 are liable to the plaintiff in the sum of \$66,405.37 for failing to provide the bond as required by Utah law.

39. Plaintiff is entitled to reasonable attorney's fees for bringing this action pursuant to Utah Code Annotated, Section 14-2-3.

FOURTH CAUSE OF ACTION

Quantum Meruit

40. Plaintiff realleges the allegations of paragraphs 1 through 39 above.

41. Plaintiff has supplied lumber materials to the subject property which has conferred a reasonable value upon the defendants Amiron and Bales Construction, Basin State Bank and the four Savings & Loans.

42. Plaintiff delivered the lumber materials described herein without being compensated therefor in an amount equal to the reasonable value of said materials. A reasonable sum therefor is the sum of \$66,405.37, of which none has been received heretofore, leaving a balance due and owing of \$66,405.37, together with interest as provided by law, against which there are no offsets, credits or claims. Plaintiff has not acted as a volunteer or intermeddler in providing the materials described herein, and the said defendants at all times acknowledged plaintiff's performance, in delivering said materials as conferring a substantial benefit upon them.

43. To permit said defendants to retain the benefits received from plaintiff without compensating plaintiff therefor, would result in the unjust enrichment of said defendants at the expense of the plaintiff, which unjust enrichment should not be countenanced by a court of equity.

FIFTH CAUSE OF ACTION

Partnership

44. Plaintiff realleges the allegations of paragraphs 1 through 43 above.

45. Plaintiff is informed and believes and thereon alleges that the defendants Amiron, Bales, Kevin Bales, Kim Bales, Herbert Bales, Mike Rasmussen, Thomas Molen, Basin State Bank, First Federal Savings & Loan Association of Grand Rapids, First Federal Savings & Loan Association of Brainerd, First Federal Savings & Loan Association of Cincinnati, Oskaloosa Home Loan & Savings Association of Oskaloosa, and John Does I - XX, inclusive, were at the times mentioned herein, in partnership with each other for the purpose of developing and improving the premises described herein.

46. In doing the acts described herein, said defendants were acting with the knowledge, consent, approval, ratification and permission of each other, and are each jointly and severally liable for the damages of the plaintiff in the amount of \$66,405.37.

SIXTH CAUSE OF ACTION

Fraud

47. Plaintiff realleges the allegations of paragraphs 1 through 46 above.

48. On or about October 18, 1982, Ken Nordley, on behalf of the defendant Basin State Bank and the four defendant Savings & Loans, represented to the owner, Amiron, the builder, Bales, and the subcontractors involved in the Ashley Park Estates Project that the four defendant Savings & Loans would provide additional financing for the completion of the improvements on said project.

49. Said representation was false, or made without a reasonable belief in its veracity, in that said defendant Savings & Loans did not agree or never intended to provide the additional financing as represented by their officer and agent, Ken Nordley.

50. Said representation was made intentionally to induce the subcontractors working on the Ashley Park Estate Project to continue to provide additional labor and materials for the completion of said project, knowing that said representation would be relied upon.

51. This plaintiff and other subcontractors have relied to their damage and detriment by providing additional credit, labor and materials on the project as stated herein. Said reliance was reasonable in that the defendant Savings & Loans were providing the financing on the Ashley Park Estates Project, were reputable lending institutions, and by their previous conduct, had gained the confidence of the subcontractors employed on the project.

52. The acts and deeds of the defendants as alleged herein, were done with wanton and willful disregard of the rights and interests of all subcontractors engaged or employed on the project, constituting malice and entitling this plaintiff to an award of punitive damages in an amount five times greater than plaintiff's actual damages of \$66,405.37, and further entitling this plaintiff to an equitable priority position ahead of said defendants to secure its debt.

SEVENTH CAUSE OF ACTION

Disregard of Corporate Entity

53. Plaintiff realleges the allegations of paragraphs 1 through 52 above.

54. Defendants Amiron Development Company and Bales Construction Corporation are the corporate alter egos of the defendants Kim Bales, Kevin Bales, Herbert Bales, Mike Rasmussen, Thomas Molen and John Does I - XX, for the purpose of improving the premises where the Ashley Park Estates Project is located.

55. Said corporate defendants never had, and do not now have, any genuine or separate corporate existence, but have been used and exist fo sole purpose of permitting Kevin Bales, Kim Bales, Herbert Bales, Mike Rasmussen, Thomas Molen, and John Does I - XX to transact their individual business under the corporate guise.

56. The plaintiff is informed and believes and thereon alleges that said individual defendants have diverted funds and depleted the corporate capital for the purpose of defrauding

this plaintiff and other subcontractors employed on the project to the extent that there are now no corporate assets to which the plaintiff and other subcontractors may look for payment.

57. Said individual defendants are therefore personally liable, jointly and severally, for the debts and obligations of their two corporate defendants to the plaintiff in the amount of \$66,405.37.

EIGHTH CAUSE OF ACTION

Co-Mingling of Funds

58. Plaintiff realleges the allegations of paragraphs 1 through 57 above.

59. The defendants Basin State Bank, Associated Title Company of Central Utah, the four Savings & Loans, Bales, Amiron, Herbert Bales, Kevin Bales, Kim Bales, Thomas Molen, and Mike Rasmussen, have diverted the proceeds of the original construction loan for the Ashley Park Estates Project to purposes other than those associated with the construction of that project.

60. The defendant Bales requested draws and the defendant Basin State Bank prepared payment checks at Bales' request for the payment of other obligations of Bales and Amiron, unrelated to the Ashley Park Estates Project.

61. The misappropriated funds were used to pay some of the expenses of Bales and Amiron incurred in the development of Pheasant Glen, another residential project developed by Amiron in Vernal. Said expenses included HOW warranty premium payment (See Check #2415, \$2,910.00, Exhibit "D" attached hereto and incorporated herein by this reference), and various bills to subcontractors.

62. The comingling and misappropriation of said construction funds, earmarked for the Ashley Park Estates Project, and upon which all of the subcontractors working for or on said project had a right to rely, constitutes fraud by said defendants upon this plaintiff.

63. The above defendants are jointly and severally liable therefore to this plaintiff in the amount of \$66,405.37.

NINTH CAUSE OF ACTION

Breach of Fiduciary Duty

64. Plaintiff realleges the allegations of paragraph 1 through 63 above.

65. The defendants Basin State Bank, Associated Title Company of Central Utah, and the four Savings & Loans owed a duty of care to the plaintiff and other subcontractors who added directly to the value of the project to assure proper progress of construction on the project by making regular, reasonable and competent inspections of the subject property, and to assure proper payment of materialmen and laborers because of: (a) experience in the building industry much greater, and known by the subcontractors to be much greater than the experience of the subcontractors, and (b) greater experience with the law relevant to building, especially Utah Code Annotated Section 14-2-1.

66. The above defendants breached their duty to the plaintiff by failing to make reasonable, regular or accurate inspections of the project as construction thereon progressed, and authorizing the disbursement of funds for other than the direct costs of construction on the subject property and in excess of the amount budgeted, to the detriment of the plaintiff.

67. The inadequate supervision by said defendants was the direct and proximate cause of the plaintiff's loss and damages, and makes them jointly and severally liable to the plaintiff in the amount of \$66,405.37.

TENTH CAUSE OF ACTION

Third-Party Beneficiary Claim

68. Plaintiff realleges the allegations of paragraphs 1 through 67 above.

69. The defendant Basin State Bank acted as the "Trustee" under a Construction Agreement dated October 13, 1981, Exhibit "E" attached hereto and incorporated herein by this reference, and was responsible for approval of payments made from the construction loan proceeds.

70. Under the Construction Agreement the defendant Basin State Bank, through its agent Bruce Watkins, and the defendant Associated Title Company of Central Utah were responsible for making inspections at the time of each draw and as otherwise reasonably necessary to verify and assume that the loan proceeds were used "strictly and solely to satisfy and pay 'direct charges, interest and costs' of financing and construction." See paragraphs 1, 14(b), (c) and (e).

71. The subcontractors employed on the Ashley Park Estates Project, including the plaintiff, are third-party beneficiaries under the Construction Agreement because all would have been benefited by the proper allocation of the construction loan proceeds.

72. At the time of the execution of the Construction Agreement, both of the above defendants knew that the subcontractors would all be significantly benefited by the proper performance of the Construction Agreement.

73. The above-named defendants owed a duty of care to the plaintiff to assure the proper progress of construction and payment of materialmen and laborers because of: (a) the Construction Agreement, a contract produced by said defendants in which they reserved the right to supervise construction and payment of materialmen and laborers; and, (b) direct payment of said expenses to Bales, the general contractor.

74. The above-named defendants breached their duty to the plaintiff by failing to make reasonable, proper or adequate inspections of the project as construction thereon progressed, and authorizing the disbursement of funds for other than the direct costs of construction on the subject property and in

excess of the amount budgeted, to the detriment and loss of the plaintiff.

75. The inadequate supervision and breach of contract by said defendants was the direct and proximate cause of the plaintiff's loss and damages, and makes them jointly and severally liable to the plaintiff in the amount of \$66,405.37.

ELEVENTH CAUSE OF ACTION

Negligence

76. Plaintiff realleges the allegations of paragraphs 1 through 75 above.

77. The defendants Basin State Bank, the four Savings & Laons and Associated Title Company of Central Utah as Lenders and disbursing agents for the construction loan proceeds for Ashley Park Estates owed a duty to the plaintiff to reasonably, properly and accurately supervise the loan, inspect the project and budget the disbursement of loan proceeds for the payment of legitimate expenses.

78. The said defendants breached their duty to the plaintiff by negligently supervising the loan, negligently inspecting the progress of construction on the project, and negligently budgeting the disbursements of the proceeds of the construction loan.

79. The negligence of said defendants, as described above, was the direct and proximate cause of the plaintiff's loss and damages, and makes them liable to the plaintiff in the amount of \$66,405.37.

80. Further, said defendants were negligent in the hiring, training and supervising of both the employees, including Bruce Watkins and Dan Turner, and the outside parties, including Freestone Construction Company, to whom were delegated the responsibilities of inspecting the progress of construction on the project, supervision of the loan account and budgeting the disbursement of the loan proceeds.

81. In light of the breach of their duties and responsibilities to properly supervise construction and the disbursement of the

construction loan proceeds, their fraud, and their co-mingling and misappropriation of the funds, and the failure to post a bond, the defendants Basin State Bank, the four Savings & Loans, Bales, Amiron, and their shareholders are equitably estopped from claiming, and denied any priority in and to the subject property ahead of this plaintiff.

WHEREFORE, Plaintiff prays the above-entitled court for judgment as follows:

First Cause of Action: Lien Foreclosure

1. That this court determine the amounts due plaintiff by defendants, and each of them.

2. For a determination and decree of the validity of the plaintiff's notice of lien filed pursuant to Utah Code Annotated, Section 38-1-1, et seq.

3. For a determination and decree adjudging priorities of each of the parties' interests in and to the subject property, and for an order directing plaintiff's lien to be foreclosed and sold as provided by law, to satisfy the amount due and owing to plaintiff, together with costs, interest, attorney's fees.

4. Should a deficiency result, that plaintiff be given a judgment for such deficiency against the defendants.

5. For such other or further relief as the court may deem just and equitable in the premises.

Second Cause of Action: Breach of Contract

As against the defendant Bales Construction:

1. For damages in the amount of \$66,405.37.

2. For interest in the amount of \$1,579.68 through August 23, 1982, and thereafter at the rate of 18% per annum until paid.

3. For such other and further relief as the Court may deem just and equitable in the premises.

Third Cause of Action: Bonding Statute

As against the defendants named therein:

1. For damages in the amount of \$66,405.37.
2. For costs, interest and attorney's fees.
3. For such other and further relief as the court may deem just and equitable in the premises.

Fourth Cause of Action: Quantum Meruit

As against the defendants named therein:

1. For a decree adjudging that defendants are obligated to plaintiff for the full value and benefit received by them under the equitable doctrine of unjust enrichment or quantum meruit in order to prevent the unjust enrichment of said defendants at the expense of plaintiff, in the amount of \$66,405.37.
2. For costs and interest.
3. For such other and further relief as the Court may deem just and equitable in the premises.

Fifth Cause of Action: Partnership

As against the defendants named therein:

1. For damages in the amount of \$66,405.37.
2. For costs, interest and attorney's fees.
3. For such other and further relief as the Court may deem just and equitable in the premises.

Sixth Cause of Action: Fraud

As against the defendants named therein:

1. For damages in the amount of \$66,405.37.
2. For punitive damages five times greater than \$66,405.37.
3. For costs, interest and attorney's fees.
4. For such other and further relief as the Court may deem just and equitable in the premises.

Seventh Cause of Action: Disregard Corporate Entities

As against the defendants named therein:

1. That the Court disregard the corporate entities named in this cause of action.
2. For damages in the amount of \$66,405.37 against the individual defendants named herein, jointly and severally.
3. For costs, interest and attorney's fees.
4. For such other and further relief as the Court may deem just and equitable in the premises.

Eighth Cause of Action: Co-Mingling of Funds

As against the defendants named therein:

1. For damages in the amount of \$66,405.37.
2. For costs, interest and attorney's fees.
3. For such other and further relief as the Court may deem just and equitable in the premises.

Ninth Cause of Action: Breach of Fiduciary Duty

As against the defendants named therein:

1. For damages in the amount of \$66,405.37.
2. For costs, interest and attorney's fees.
3. For such other and further relief as the Court may deem just and equitable in the premises.

Tenth Cause of Action: Third-Party Beneficiary Claim

As against the defendants named therein:

1. For damages in the amount of \$66,405.37.
2. For costs, interest and attorney's fees.
3. For such other and further relief as the Court may deem just and equitable in the premises.

Eleventh Cause of Action: Negligence

As against the defendants named therein:

1. For damages in the amount of \$66,405.37.

2. For costs, interest and attorney's fees.

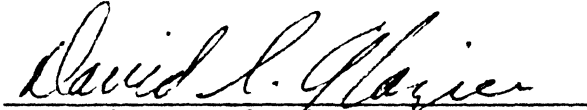
3. For such other and further relief as the Court may deem just and equitable in the premises.

Further, for a decree adjudging that the defendants named in paragraph 81 above are equitably estopped from claiming, and are denied, priority in and to the subject property ahead of this plaintiff, for the reasons set forth in paragraph 81.

DATED this 10th day of June, 1983.

PARK & ROBINSON

By


David L. Glazier
Attorney for Plaintiff

Plaintiff's Address:

P.O. Box 280

Lake Oswego, Oregon 97034

MAILING CERTIFICATE

I hereby certify that copies of the foregoing were served this 10th day of June, 1983, by mailing on said date copies thereof by United States Mail, first class, postage prepaid, addressed to Bruce A. Maak, of MAAK & MAAK, 370 East South Temple, Suite 300, Salt Lake City, Utah 84111-1288, Kent T. Anderson of JONES, WALDO, HOLBROOK & McDONOUGH, 800 Walker Bank Building, Salt Lake City, Utah, 84111, DeLoy N. Sallenback, 3707 N. Canyon Road, Suite 1B, Provo, Utah 84604, Gary H. Weight, of ALDRICH, NELSON, WEIGHT & ESPLIN, 43 East 200 North, P.O. Box L, Provo, Utah, 84603, Clark B. Allred and Gayle F. McKeachnie of NIELSON & SENIOR, 363 East Main Street, Vernal, Utah 84078, Gregory S. Bell, 376 East 400 South, Suite 210, Salt Lake City, Utah 84111, John W. Lowe of LOWE & ARNOLD, 50 West Broadway, Suite 400, Salt Lake City, Utah 84111, Dallas H. Young, Jr., and Jerry L. Reynolds of IVIE & YOUNG, 48 N. University Avenue, P.O. Box 672, Provo, Utah 84603, and Mark W. Nash of

IN THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

TREE PRODUCTS COMPANY, an Oregon Corporation,	)		FILED DISTRICT COURT UINTAH COUNTY UTAH
)		
Plaintiff,	)	<u>RULING</u>	FEB 15 1985
	)		DOROTHY LUCK CLERK
vs.	)		BY _____ DEPUTY
)		
AMIRON DEVELOPMENT COMPANY, a Utah corporation and BALES CONSTRUCTION CORPORATION, a Utah corporation, et al)		
)		
Defendants.	)	Civil No. 11,710	

ECONOMY BUILDERS SUPPLY, INC., et al,)		
)		
Plaintiff,)		
)		
vs.)		
)		
AMIRON DEVELOPMENT COMPANY, et al,)		
)		
Defendants.	)	Civil No. 11,923	

This matter came before the Court pursuant to the motion made by Plaintiff Tree Products Cocmpany alleging negligence on the part of Defendant Basin State Bank. The Court having heard the argument and having taken the matter under advisement now makes the following ruling.

Plaintiff Tree Products alleges that Basin State Bank had a duty to inspect the project, to supervise and manage the loan and

that such duty was owed to Tree Products. However, the facts in this case show that the loan agreement was entered into between Basin State Bank and Amiron Development. Subsequently, the funds were disbursed at the direction of Amiron. While Tree Products may have been an ultimate beneficiary of that agreement, no duty exists on the part of the bank which is owed to them. In addition, in carrying out its duty to Amiron, Basin State did tender payment to Tree Products but due to controversy with Amiron, Tree Products refused payment. At the direction of Amiron, the money was utilized to pay other bills.

The argument of Plaintiff Tree Products would place the bank in the position of owing conflicting duties and of owing duties not contemplated in the making of the construction loan. The Bank would be set up in the position of project overseer and manager not only of the construction funding but also of the actual construction. This is not such a duty as any bank would contract for and is not what was done here.

Defendant Basin State Banks' Motion for Summary Judgment dated November 9, 1984 is hereby granted.

DATED this 15 day of February, 1985.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Richard R. Davidson", written over a horizontal line.

cc: Mark F. Robinson & David L. Glazier
Clark B. Allred
Joseph R. Fox
Bruce A. Maak
Robert A. Alderman
Kevin O'Connell
Kent T. Anderson
Joseph Rust

FILED
DISTRICT COURT
MAR 11 1935
BY _____ DEPUTY

CLARK B. ALLRED
GAYLE F. McKEACHNIE
NIELSEN & SENIOR
Attorneys for Defendant
Basin State Bank
363 East Main Street
Vernal, Utah 84078
Telephone: (801) 789-4908

IN THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

TREE PRODUCTS COMPANY, an)	
Oregon corporation,	)	SUMMARY JUDGMENT
)	
Plaintiff,)	
)	
vs.)	
)	
AMIRON DEVELOPMENT CORPORATION,)	
a Utah Corporation, et al.,)	
)	
Defendants.	)	Civil No. 11,710

ECONOMY BUILDERS SUPPLY, INC.,)	
a Utah Corporation, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
AMIRON DEVELOPMENT CORPORATION,)	
a Utah Corporation, et al.,)	
)	
Defendants.	)	Civil No. 11,923

The above captioned matter came before the Court pursuant to Plaintiff, Tree Products Company's, Motion for Summary Judgment and Defendant, Basin State Bank's, Motion for Summary Judgment. The issue before the Court was what duty, if any, was owed by Basin State Bank to Tree Products Company, to inspect the project

and to supervise and manage the construction loan. All other issues have been resolved either by rulings of the Court or stipulation of the parties.

Counsel for Tree Products Company and Basin State Bank have submitted Memoranda setting forth the undisputed facts and the parties having agreed that the facts are undisputed and that pursuant thereto the Court should determine, as a matter of law, the duty owed, if any, by Basin State Bank to the Plaintiff. The Court having reviewed the Memoranda, submitted by the parties, having reviewed the documents in the file, having heard argument by counsel and having taken the matter under advisement and entered its Ruling and being fully advised enters the following conclusions:

1. The loan agreement is between Basin State Bank and Amiron Development. The funds were disbursed under the direction of developer, Amiron.

2. Basin State Bank, under the direction of Amiron, did tender payment to Tree Products Company. Due to a controversy between Tree Products Company and Amiron, Tree Products Company refused payment. Basin State Bank then, at the direction of Amiron, disbursed the money to pay other bills of Amiron.

3. The argument of Plaintiff, Tree Products Company, would put Basin State Bank in a position of owing conflicting duties to various parties and of owing duties not contemplated when it entered into the construction loan. The argument of Tree

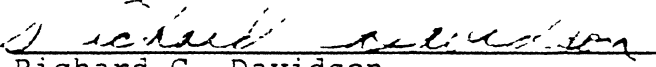
Products Company would require that Basin State Bank be in the position of project overseer and manager, not only of the funding, but also of the actual construction of the project. That is not a duty that was contemplated by Basin State Bank or by any bank when it enters into a construction funding arrangement.

4. Based upon the findings herein, and the undisputed facts the Court finds that no duty was owed by Basin State Bank to Plaintiff, Tree Products Company, and that therefore, Basin State Bank is entitled, as a matter of law, to an Order of Dismissal with prejudice on that issue.

Pursuant to the findings of the Court and the Court being fully advised, the Court hereby grants Basin State Bank's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment and hereby;

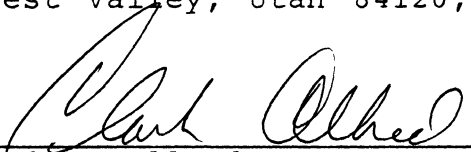
ORDERS, ADJUDGES AND DECREES that the issue remaining before the Court regarding the duty owed by Basin State Bank to Tree Products Company is hereby dismissed with prejudice.

DATED this ^{3rd} day of ~~February~~ ^{March}, 1985.


Richard C. Davidson
District Judge

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Respondent to Dean H. Becker, 4000 West 4059 South, West Valley, Utah 84120, on this 14 day of March, 1986.


Clark B. Allred